IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1947

Criminal Action No. 294-48

THE UNITED STATES OF AMERICA

v.

MARYLAND & VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on April 27, 1948. A notice of appeal is presented to the District Court herewith, to wit, on May 11, 1948.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U.S.C. Supp. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U.S.C. 345.

STATUTE INVOLVED

Section 3 of the Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. 3, known as the Sherman Act, provides as follows:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

The indictment, which is in one count, was returned on March 8, 1948. It names as defendants the Maryland and Virginia Milk Producers Association, Inc., an association of milk producers; B. B. Derrick, secretary-treasurer of the Association; and seven corporations engaged in the business of purchasing milk and cream and selling fluid milk and cream and milk products to consumers and other purchasers in the District of Columbia and nearby parts of Virginia and Maryland. The seven corporate defendants are referred to as defendant distributors.

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The indictment may be summarized as follows:

The defendant Association has as members approximately 1500 producers of milk located in the States of Maryland and Virginia, who supply approximately 80% of the total amount of milk sold to distributors in the Washington metropolitan area.[1] The defendant distributors buy and resell approximately 86% of the total amount of milk supplied from all sources to the Washington metropolitan area.

The indictment charges that the defendants have engaged in a conspiracy, beginning about the year 1930 and continuing to the date of the indictment, to eliminate and suppress competition in the sale of milk to and the purchase of milk by defendant distributors, and in the sale of fluid milk [2] and cream and milk products by defendant distributors to consumers and other purchasers in the Washington metropolitan area, in restraint of trade and commerce in milk products within the District of Columbia and between the District of Columbia and States of the United States, in violation of Section 3 of the Sherman Act.

Defendants' conspiracy has consisted of continuing agreement and concert of action among them, the terms of which are, among others:

That the defendant distributors enter into contracts and agreements with the Association to purchase their entire requirements of milk from the

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[1] The Washington metropolitan area is defined as the District of Columbia and nearby areas within Montgomery and Prince Georges Counties, Maryland, and Arlington and Fairfax Counties, Virginia, and the City of Alexandria, Virginia.

[2] Fluid milk is defined as milk sold by distributors in fluid form for human consumption.

Association to the extent it is able to supply said requirements, and to cease and refrain from the purchase of milk from producers not members of the Association, and from other sources; and that the Association agree with defendant distributors to supply them with their full requirements of milk to the extent the Association can so do;

That the Association charge each defendant distributor the same price as is charged to each other defendant distributor; and that the defendants agree that the Association refuse to supply milk to any distributor who has not agreed to purchase his full requirements from the Association, at prices as low as those charged to defendant distributors;

That the defendants agree upon a classification of milk into three classes governed and determined by the use to which milk is put by the defendant distributors; that the defendants agree upon the price to be paid by defendant distributors to the Association for each class of milk; and that the defendants agree that the defendant distributors shall not resell as fluid milk any milk which is purchased by them at a price below that charged for Class I, or highest priced class;

That the Association persuade and induce the Health Department of the District of Columbia to prevent the importation of milk from States other than Maryland and Virginia;

That the defendants agree to abandon and cause to be terminated a federal milk marketing order affecting milk prices in the Washington metropolitan area following determination by the defendants that this order, if continued, would result in a reduction in the price to be paid by distributors, and in the price to be charged to consumers, for milk;

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that the defendants agree to persuade and induce the Virginia Milk Marketing Commission to promulgate orders fixing minimum prices applicable to the purchase of milk and to the sale of fluid milk and cream by distributors in Arlington County and in Alexandria, Virginia; and that the defendants agree to adopt and apply to purchases of milk for resale in the District of Columbia the minimum prices so established by the Virginia State Milk Marketing Commission;

That the defendants discuss and agree upon the prices at which the defendant distributors shall sell fluid milk and cream to consumers and other purchasers in the Washington metropolitan area;

That the defendants agree that whenever the amount of milk available for sale by the Association exceeds the amount which defendant distributors can resell as fluid milk at the prices agreed upon, the defendants will remove the excess from the market by converting it into products other than fluid milk, even though defendant distributors might suffer a financial loss thereon;

That the defendants agree that the Association will prevent and eliminate competition from distributors who do not have full-supply contracts with the Association, and eliminate and suppress competition in the sale of fluid milk and cream by distributors, by inducing and persuading distributors not to cut prices; by attempting to deprive price-cutting distributors of an adequate supply of milk; by supplying milk to defendant distributors at cut prices for use by them in taking away business from price-cutting distributors; by interfering with the ability of producers to transport milk to price-cutting distributors; by forcing price-cutting

distributors into bankruptcy; and by other means.

The indictment also alleges that the purpose and effect of the conspiracy have been, among other things, to create in the Washington metropolitan area a rigid and artificial pricing structure in the sale of fluid milk, which has increased its price to consumers and other purchasers, and has insulated it from the normal influences which determine prices.

Defendant B. B. Derrick filed a motion to dismiss the indictment upon the ground that it "is bad in substance in that it charges acts by an agriculture co-operative which are immune from prosecution under the Anti-trust Laws by reason of" Section 6 of the Clayton Act, 15 U.S.C. 17, Sections 1 and 2 of the Capper-Volstead Act, 7 U.S.C. 291-292, and the Agricultural Adjustment Act, 7 U.S.C. 602, *et seq.* A memorandum of points and authorities attached to this motion shows that it is grounded solely on the contention that the acts charged in the indictment are exempted from the Sherman Act by provisions of the Clayton Act, the Capper-Volstead Act, and the Agricultural Adjustment Act.

Simpson Brothers, Inc., one of the defendant distributors, filed a motion to dismiss the indictment upon the ground that it was duplicitous. This defendant also moved to dismiss on the ground that the indictment "does not state facts sufficient to constitute an offense against the United States." The points and authorities cited thereunder are Section 12 of the Clayton Act, *United States* v. *Hutcheson,* 312 U. S. 219, which dealt with exemptions from the Sherman Act given by the Clayton Act, and four decisions of state courts holding cer-

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tain marketing agreements entered into by agricultural co-operatives not in illegal restraint of trade under either state or federal law.

The district court, after hearing argument on the motions, rendered an oral opinion holding that the indictment is not duplicitous but that it is bad in substance because it fails to charge a crime. The court stated that while agricultural co-operatives are not wholly exempt from the Sherman Act, "the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in the argument and judicial precedents presented." The court further stated that its holding as to invalidity applied to all the defendants.

The judgment which the court entered granted the motions to dismiss filed by B. B. Derrick and Simpson Brothers, Inc., and also dismissed the indictment "as to all remaining defendants."

It is clear that the district court dismissed the indictment solely upon the ground that the facts charged therein have been withdrawn from the prohibitions of the Sherman Act by later federal legislation. The decision was therefore "based upon the [invalidity or] construction of the statute upon which the indictment [or information] is founded," within the meaning of the Criminal Appeals Act, and an appeal lies to this Court. *United States* v. *Borden Co.*, 308 U. S. 188, is squarely in point as to the Government's right to appeal to this Court.

In the *Borden* case, as here, the principal defendants were distributors of milk in a city marketing area (Chicago) and a co-operative association of milk producers from which the distributor defend-

ants purchased most of their milk. In the *Borden* case, as here, the defendants were charged with conspiring to restrain trade and fix prices in the sale of milk from producers to distributors and in the sale of milk by distributors to consumers and others, and with conspiring to limit the supply of milk moving into the city marketing area in question.[3] In the *Borden* case, as here, the district court held that, because of the effect of Sections 1 and 2 of the Capper-Volstead Act and the Agricultural Marketing Agreement Act of 1937,[4] the indictment did not charge an offense under the Sherman Act. This Court, in upholding an appeal to it from this decision, said (p. 195):

> This was necessarily a construction of the Sherman Act. [Citing cases.] We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.
>
> We have jurisdiction under the Criminal Appeals Act to determine whether the con-

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[3] The indictment in the present case charges an over-all conspiracy among the defendants, whereas the indictment in the *Borden* case charged, in counts one, two, and four, three separate conspiracies among the defendants. Count three of that indictment, which the district court held to be duplicitous, is not presently relevant.

[4] This Act amended and reenacted the provisions of the Agricultural Adjustment Act of 1933 authorizing the Secretary of Agriculture to issue milk marketing orders (50 Stat. 246).

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struction thus placed upon the Sherman Act is correct.

The holding in the *Borden* case that there is a construction of the statute on which the indictment is founded when an indictment charging violation of the Sherman Act is dismissed upon the ground that later legislation has exempted from that Act the conduct charged in the indictment is, of course, controlling as to the Government's right to appeal to this Court in the instant case, although here, but not in the *Borden* case, Section 6 of the Clayton Act was included among the later legislation which, as interpreted by the district court, immunized the acts charged in the indictment.[5] The principle is the same whether the district court's holding as to immunization is based upon one, two or three subsequent federal statutes.

For further authorities as the Government's right to appeal to this Court, see *United States* v. *Hastings*, 296 U. S. 188, 194-195; *United States* v. *Lepowitch*, 318 U. S. 702, 703-704. Cf., *United States* v. *Wayne Pump Co.*, 317 U. S. 200; *United States* v. *Swift & Co.*, 318 U. S. 442.

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[5] In the *Borden* case this Court said (pp. 191-192) that the district court, "according to the formal terms of its judgment," held that the defendant agricultural cooperative was exempt from prosecution under Section 1 of the Sherman Act by Section 6 of the Clayton Act, as well as Sections 1 and 2 of the Capper-Volstead Act and the Agricultural Marketing Agreement Act, but this Court later said (p. 196) that the district court had not held that Section 6 of the Clayton Act rendered the cooperative immune from prosecution under the Sherman Act for its alleged participation in the conspiracies charged in counts one, two and four of the indictment.

THE QUESTIONS ARE SUBSTANTIAL

Insofar as the district court based its decision on the immunizing effects of the Capper-Volstead Act or the Agricultural Adjustment Act, its decision seems to be a clear misapplication of the interpretation placed upon these statutes in the *Borden* case (308 U. S. 188, 196-206). While the oral opinion of the district court does not disclose the grounds upon which it distinguished the present case from the *Borden* case, its construction of the foregoing statutes clearly presents a substantial question.

We also submit that insofar as the district court based its decision on the immunizing effect of Section 6 of the Clayton Act, its construction of that Section, which we believe to be clearly erroneous, presents a question of substance. What the indictment charges is a conspiracy between an agricultural cooperative and various distributors of milk who purchase from this cooperative, to fix the price at which such distributors sell milk, to control their disposition of milk, and to suppress the competition of, and to cut off supplies of milk from, other distributors.

Since Section 6 of the Clayton Act applies *pari passu* to labor organizations and agricultural organizations, the decisions dealing with the application of the Section to labor organizations are in point; they show that Section 6 does not exempt from the antitrust laws the conspiracy charged in the present case. In *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 808, this Court held that Congress never intended that the exemptions from the antitrust laws given by the Clayton Act should permit labor unions to "aid non-labor groups to

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create business monopolies and to control the marketing of goods and services." Accord, *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 400. In the Allen Bradley case the Court, after pointing out that Section 6 applies to labor or agricultural organizations "instituted for purposes of mutual help," said (p. 808):

> But "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. And in an analogous situation where an agricultural association joined with other groups to control the agricultural market, we said:
>
> "The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U. S. 188, 204-205. (Italics supplied.)

The questions presented by the present appeal are precisely like those presented by the appeal in the *Borden* case. The allowance of that appeal constitutes an affirmation that the questions are substantial.

This appeal presents the further substantial question, upon which this Court has not passed, as to the extent to which a farm cooperative may lawfully go in eliminating competition from producers not members of the cooperative, and among distributors, through the use of exclusive dealing contracts and other trade-restraining practices as charged in the indictment.

The questions here presented are involved in other pending proceedings brought by the United

States under the Sherman Act and authoritative determination of these questions will be of great aid in the administration of the Act.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

May 11, 1948.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM 1947

Criminal Action No. 294-48

UNITED STATES OF AMERICA

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

OPINION OF COURT

KEECH, *J:*

The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must— to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

MR. WINN: Exception. That there are not adequate facts pleaded to make an offense.

MR. SEAL: That goes to all the defendants?

THE COURT: Yes, sir.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

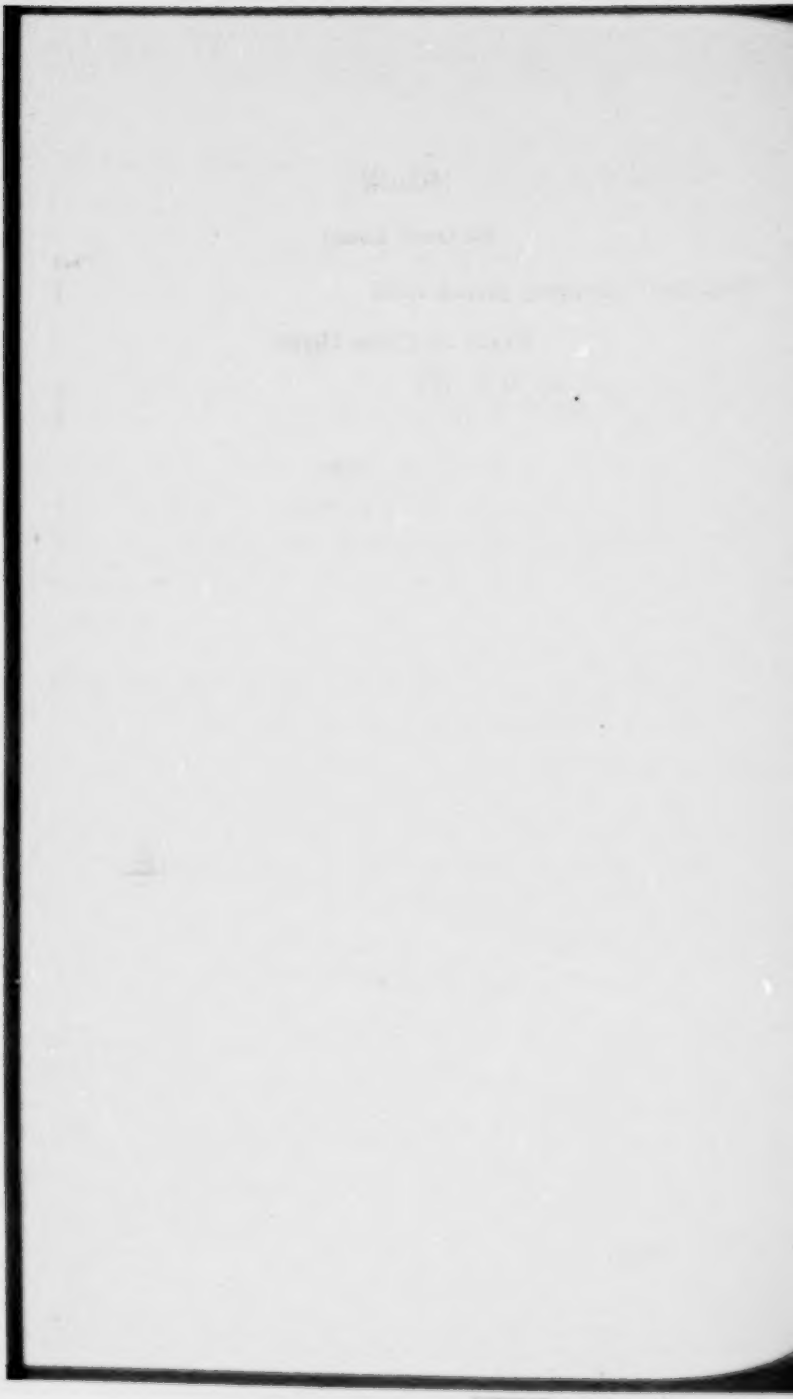
vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., OPPOSING JURISDICTION.

ELWOOD H. SEAL,
Counsel for Appellee.



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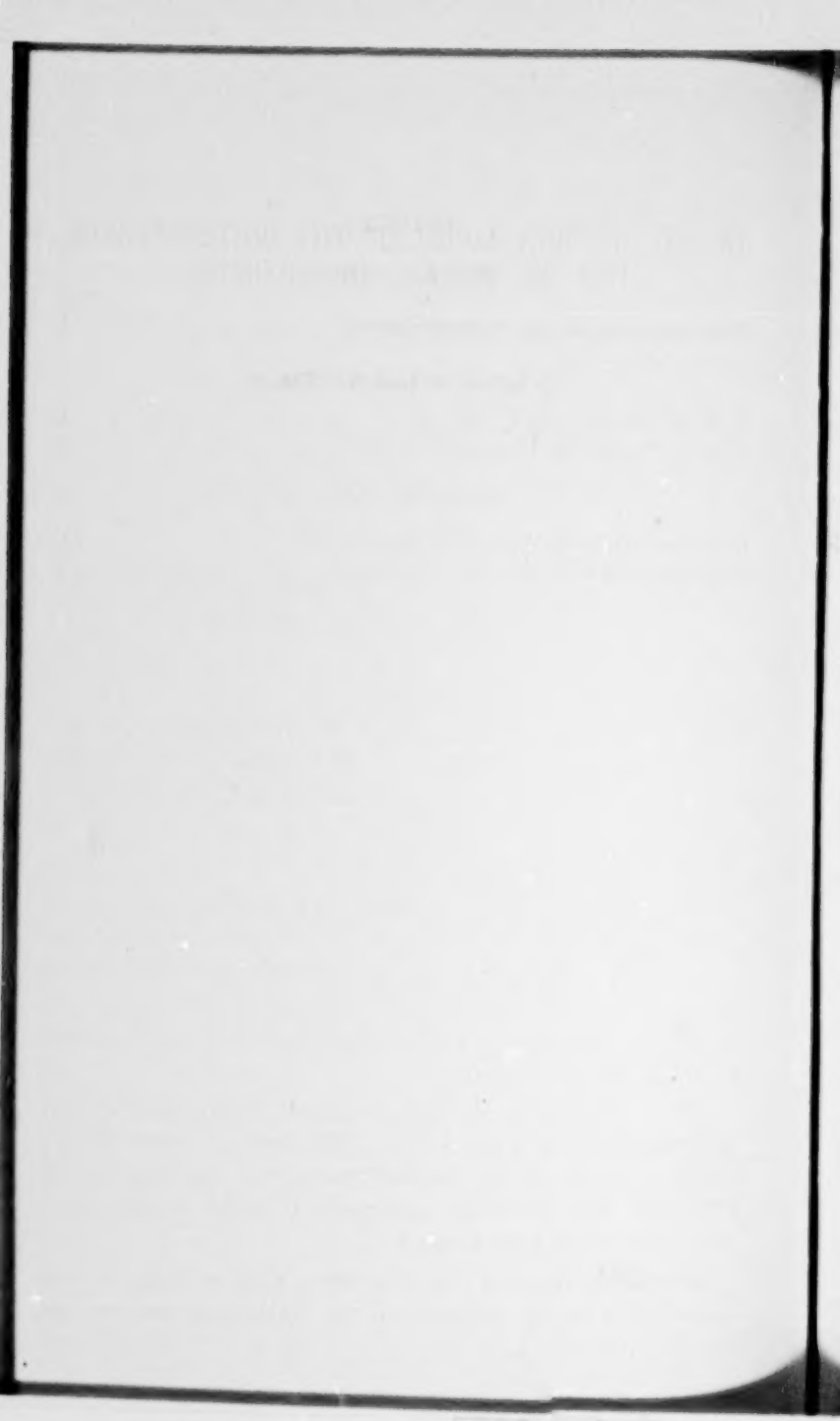

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT IN OPPOSITION TO JURISDICTION ON BEHALF OF DEFENDANT, MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.

Comes now Maryland and Virginia Milk Producers Association, Inc., by its attorney, and, pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, submits the following statement disclosing matter or ground making against the jurisdiction of the Supreme Court in the instant case.

The United States attempts to appeal, under the Criminal Appeals Act (18 U.S.C.A. Sec. 682) from an order of the District Court of the United States for the District of Columbia dismissing an indictment founded on Section 3 of the Sherman Anti-Trust Act.

Motions to dismiss the indictment were granted by the court below on the ground that the indictment does not set

forth facts sufficient to charge a crime. The oral opinion of the court below concerning the action taken by it on the motions to dismiss reads as follows:

"OPINION OF COURT.

KEECH, J.: The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

MR. WINN: Exception. That there are not adequate facts pleaded to make an offense.

MR. SEAL: That goes to all the defendants?

THE COURT: Yes, sir."

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The order entered by the court below on the motions to dismiss reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Criminal No. 294-48

UNITED STATES

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL., Defendants

Filed April 27, 1948. Harry M. Hull, Clerk

Order Dismissing Indictment

Upon consideration of the motions of the defendants, Simpson Brothers, Inc., and B. B. Derrick, respectively, to dismiss the indictment in the above entitled cause,

It is this 27th day of April, A.D. 1948,

ORDERED, That the motion of Simpson Brothers, Inc. to dismiss the indictment be and the same is hereby granted, and

IT IS FURTHER ORDERED, That the motion of the defendant B. B. Derrick to dismiss the indictment be and the same is hereby granted, and

IT IS FURTHER ORDERED, That upon consideration of the Court's motion, the indictment in the above-en titled cause be and the same is hereby dismissed as to all remaining defendants.

By the Court

(S.) R. B. KEECH,
Associate Justice."

The oral opinion shows that the court below did not predicate its dismissal of the indictment in this case solely on the construction of a statute. It follows, accordingly, that the Supreme Court has no jurisdiction over the instant appeal.

Under the Criminal Appeals statute, the Supreme Court has jurisdiction over a direct appeal from an order dismissing an indictment only in the event that the decision is predicated solely on the construction of a statute. *U. S.* v. *Borden*, 308 U. S. 188, 193. If the decision is, even "in part at least," based "on the inadequacy of the allegations of the indictment" to charge an offense, the ruling is predicated on a "matter of pleading" and the "correctness • • • [of the ruling] cannot under the statute be reviewed • • • on direct appeal from the district court." *U. S.* v. *Swift*, 318 U. S. 442, 444.

The only basis given by the court below for its dismissal of the indictment was contained in its oral opinion. The order entered by the District Court merely stated that the motion to dismiss had been granted. Looking at the oral opinion, it appears that the court placed its dismissal of the indictment on the ground, twice stated, that the indictment failed to set forth sufficient facts. Thus, the court said: "there has been a failure to set forth sufficient facts," and, again, "the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented." Counsel for the United States, in stating his exception, construed the ruling to be "that there are not adequate facts pleaded to make an offense."

Therefore, it seems plain that the ruling of the District Court that the indictment in the instant case fails to set forth sufficient facts to make out a conspiracy is, within the doctrine of the *Swift* case, *supra*, a ruling based "in part at least" on the inadequacy of the indictment as a pleading. From this it follows, we think, that the Supreme Court does not have jurisdiction over the instant appeal.

The reporter's transcript of the arguments supporting the motions to dismiss in this case has not been available

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to the defendants, with the exception of the one page setting forth the opinion of the lower court quoted in the beginning of this Statement, and will not be available until some time after the date upon which this defendant is required to file a statement in opposition to jurisdiction. This defendant is, therefore, unable at this time to point out the portions of the argument of counsel in the lower court relating to grounds other than the construction of the Sherman Act and other statutes, although such other grounds were urged upon the lower court in support of the motions to dismiss the indictment.

It is respectfully requested that this defendant be permitted to file a supplementary statement in opposition when the transcript of the argument in the lower court is made available to it, if this Court be of the view that the transcript of the argument is essential to a decision as to jurisdiction.

Respectfully submitted,

ELWOOD H. SEAL,
Attorney for Defendant,
Maryland and Virginia Milk
Producers Association, Inc.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

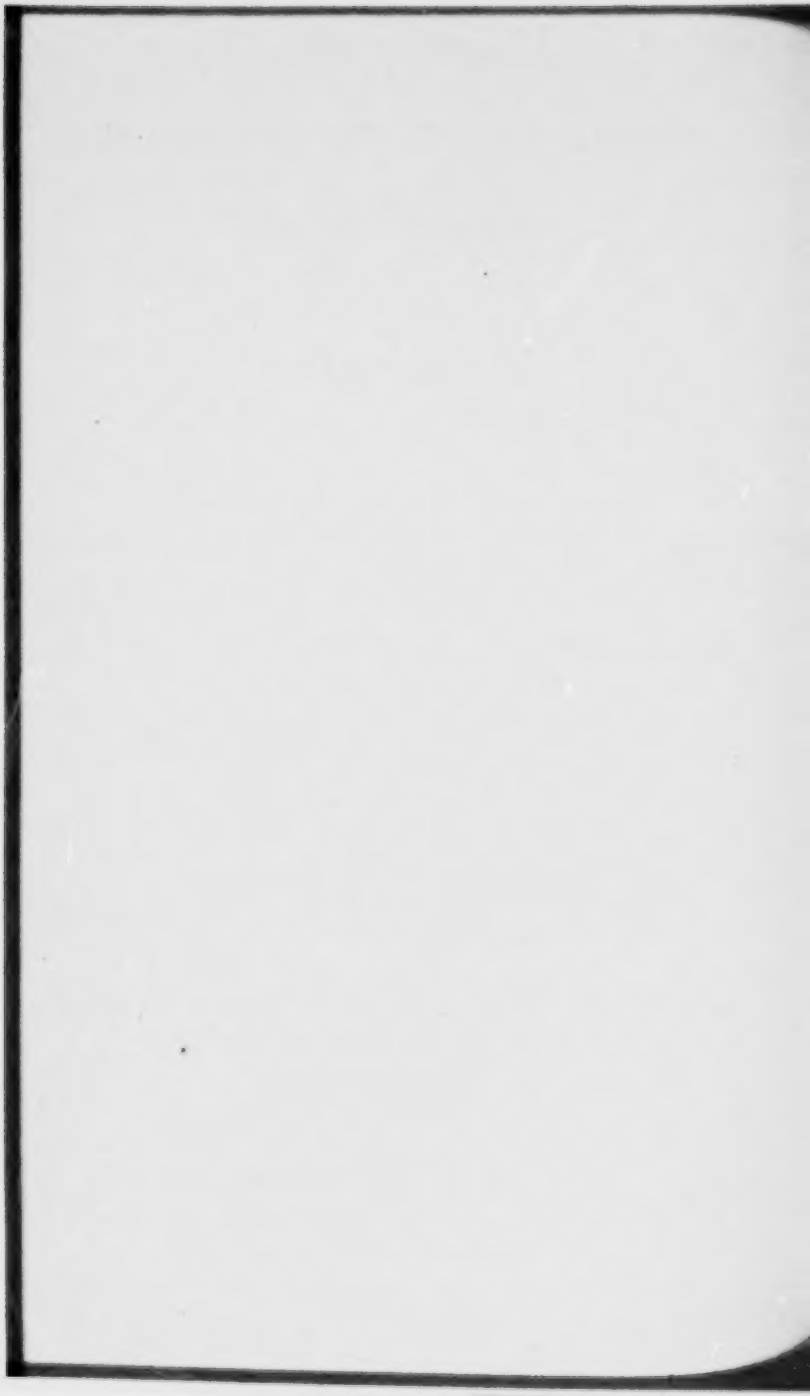
vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF ALEXANDRIA DAIRY PRODUCTS CO., INC., OPPOSING JURISDICTION

WILLIAM BLUM, JR.,
Counsel for Appellee.



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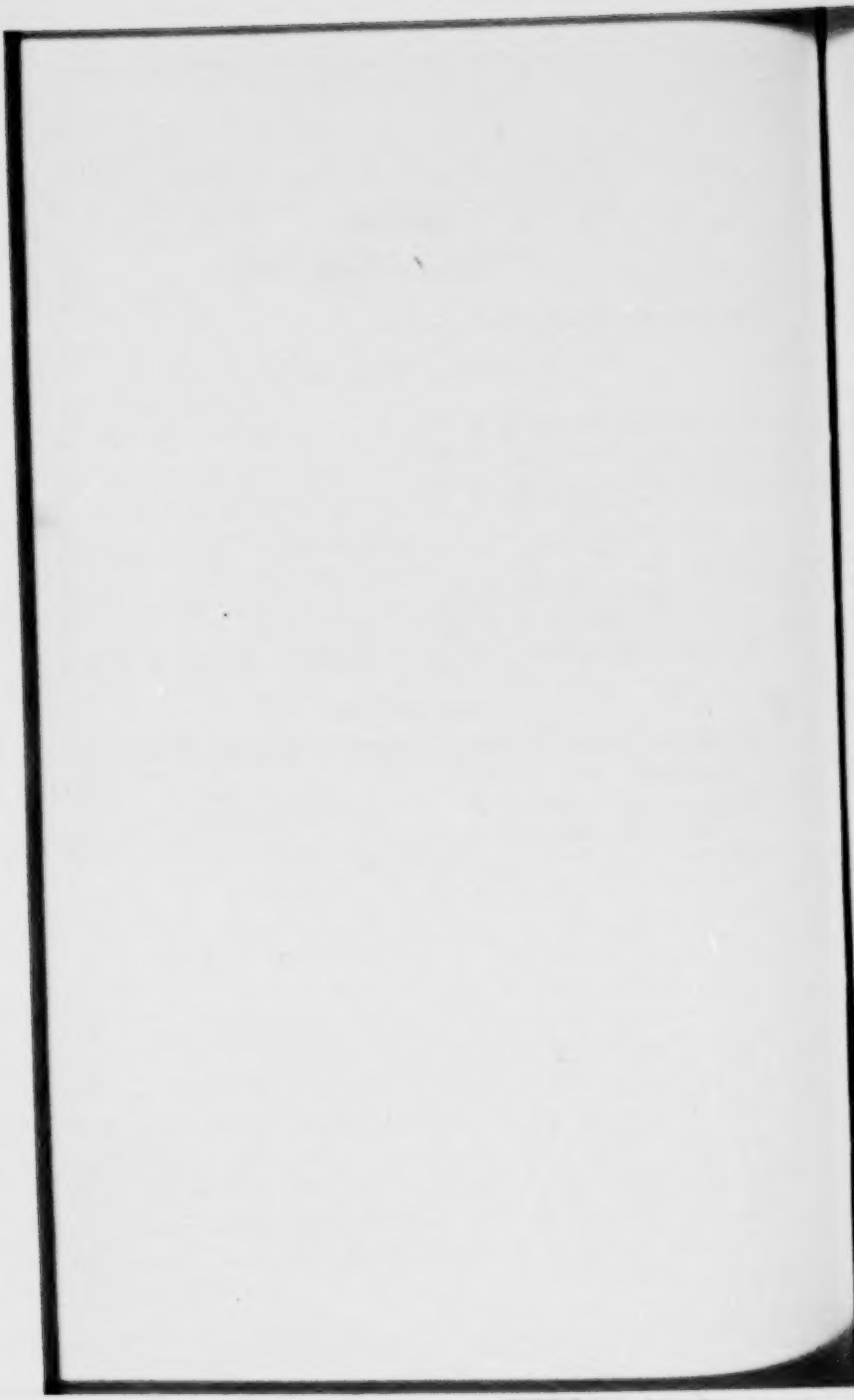

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

CRIMINAL ACTION

No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT IN OPPOSITION TO JURISDICTION ON BEHALF OF DEFENDANT, ALEXANDRIA DAIRY PRODUCTS CO., INC.

Alexandria Dairy Products Co., Inc., by its attorney, pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, submits the following statement in opposition to the jurisdiction of the Supreme Court in the instant case.

The United States attempts to appeal, under the Criminal Appeals Act, as amended by the Act of May 9, 1942, 56 Stat. 271, Chap, 295, 18 U. S. C. A. Sec. 682, Pocket Part, from an order of the District Court of the United States for the District of Columbia dismissing an indictment allegedly based on Section 3 of the Sherman Anti-Trust Act.

Motions to dismiss the indictment were granted by the court below with an oral opinion as follows:

"Opinion of the District Court

The Court: The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

Mr. Seal: That goes to all the defendants?

The Court: Yes, sir." (R. 333-334)

The oral opinion shows that the court below did not predicate its dismissal of the indictment in this case solely on the construction of a statute, and hence the Supreme Court has no jurisdiction over the instant appeal.

The Criminal Appeals statute limits the instances in which the Supreme Court has jurisdiction on a direct appeal from an order dismissing an indictment to decisions predicated *solely* on the construction of a statute. *U. S.* v. *Borden,* 308 U. S. 188, 193. If the decision is, even "in part

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at least," based "on the inadequacy of the allegations of the indictment" to charge an offense, the ruling is predicated on a "matter of pleading" and the "correctness • • • (of the ruling) cannot under the statute be reviewed • • • on direct appeal from the district court." *U. S.* v. *Swift*, 318 U. S. 442, 444.

The only basis given by the court below for its dismissal of the indictment was contained in its oral opinion, in which it appears that the court placed its dismissal of the indictment on the ground, twice stated, that the indictment failed to set forth sufficient facts. Counsel for the United States, in stating his exceptions, construed the ruling to be "that there are not adequate facts pleaded to make an offense."

Therefore, it seems plain that the ruling of the District Court that "the indictment in this case does not set forth sufficient facts to constitute a conspiracy" is, within the doctrine of the *Swift* case, *supra*, a ruling based "in part at least" on the inadequacy of the indictment as a pleading. From this it follows, we think, that the Supreme Court does not have jurisdiction over the instant appeal.

The decision below, at best, must be held ambiguous, and under these circumstances no appeal lies to this Court. The Supreme Court in *U. S.* v. *Wayne Pump Co.*, 317 U. S. 200-204, dismissed the appeal, stating, "The language of the opinion makes it apparent to us that the District Court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments." In *U. S.* v. *Carter*, 231 U. S. 492, again the Supreme Court refused to attempt to solve the problem as to the ground on which the court ruled by an examination of the entire record. It held that the Criminal Appeals Act precluded review *in the absence of a clear showing that the statute applied.* In *U. S.* v. *Moist*, 231 U. S. 701, this Court like-

wise refused to pass on an appeal where it did not appear on what ground the court acted.

As stated in *Robertson & Kirkham's Jurisdiction of the Supreme Court,* Section 169: "Where the grounds of the District Court's decision are ambiguous, doubt will be resolved *against* applied jurisdiction." Also suggested in that section is the following proposal which would resolve what the Court intended:

> "In order to guard against difficulties of this character, it has become established practice to procure the District Judge to *execute a certificate declaring that his judgment was put entirely upon the construction or the invalidity of the statute* upon which the indictment was founded and to include such certificate in the transcript of record on appeal." Italics supplied by counsel.)
>
> Citing: *U. S.* v. *Chavez,* 290 U. S. 357-59;
> *U. S.* v. *Flores,* 289 U. S. 137-145;
> *U. S.* v. *Hastings,* 296 U. S. 190-191;
> *U. S.* v. *Halsey Stewart Co.,* 296 U. S. 451.

The reporter's transcript of the arguments supporting the motions to dismiss in this case were not received by this defendant until June 2, 1948, and on receipt was found to be full of errors, garbles, and incomplete statements. Before this transcript is accepted as the record in the case, the defendant would like an opportunity to eliminate or clear up some of the less intelligible spots.*

---

* The transcript starts off on page 2 with Alexandria Dairy's attorney named as William J. Blum instead of William Blum, Jr. In addition to generally confusing both the Court's questions to him and his answers thereto, appearing on pages 66, 67 and 68, the name "Alexandria" was substituted by the stenographer for the words "Chevy-Chase Chestnut Farms" in the critical statement of Government counsel on page 94, line 3.

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Conclusion

Because it is contended that the judgment below was at least in part based upon the invalidity of the indictment as a pleading, the present appeal should be remanded in accordance with the provisions of the Act of May 9, 1942, 18 U. S. C. A. 682 (Pocket Part) to the Circuit Court of Appeals for the District of Columbia. Or if the government insists that the judgment below was based solely upon a construction of a Federal statute, it should pursue the obvious course of obtaining a certificate to that effect from the trial judge, in accordance with approved practice. Neither this Court nor counsel should be burdened with the difficulty and uncertainty of a procedural question, jurisdictional in character, which can so easily be eliminated from the case.

Respectfully submitted,

WILLIAM BLUM, JR.,
1741 K Street, N. W.,
Washington, D. C.
Attorney for Defendant, Alexandria
Dairy Products Co., Inc.

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Office Supreme Court,
FILED
JUN 17 1948

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATON, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF CHESTNUT FARMS-CHEVY CHASE DAIRY OPPOSING JURISDICTION, AND SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION WITH MOTION TO TRANSFER TO UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

ROGER J. WHITEFORD,
JOHN J. WILSON,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

Criminal Action

No. 294-48

STATEMENT IN OPPOSITION TO JURISDICTION ON BEHALF OF DEFENDANT, CHESTNUT FARMS-CHEVY CHASE DAIRY

Comes now Chestnut Farms-Chevy Chase Dairy, by its attorney, and, pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, submits the following statement disclosing matter or ground making against the jurisdiction of the Supreme Court in the instant case.

The United States attempts to appeal, under the Criminal Appeals Act (18 U. S. C. A. Sec. 682) from an order of the District Court of the United States for the District of Co-

lumbia dismissing an indictment founded on Section 3 of the Sherman Anti-Trust Act.

Motions to dismiss the indictment were granted by the court below on the ground that the indictment does not set forth facts sufficient to charge a crime. The oral opinion of the court below concerning the action taken by it on the motions to dismiss reads as follows:

"Opinion of Court

Keech, J.: The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

Mr. Seal: That goes to all the defendants?

The Court: Yes, sir."

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The order entered by the court below on the motions to dismiss reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Criminal No. 294-48

Filed April 27, 1948, Harry M. Hull, Clerk

UNITED STATES

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al., Defendants

Order Dismissing Indictment

Upon consideration of the motions of the defendants, Simpson Brothers, Inc., and B. B. Derrick, respectively, to dismiss the indictment in the above entitled cause,

It is this 27th day of April, A. D. 1948,

Ordered, That the motion of Simpson Brothers, Inc. to dismiss the indictment be and the same is hereby granted, and

It Is Further Ordered, That the motion of the defendant, B. B. Derrick to dismiss the indictment be and the same is hereby granted, and

It Is Further Ordered, That upon consideration of the Court's motion, the indictment in the above-entitled cause be and the same is hereby dismissed as to all remaining defendants.

By the Court,

(S.) R. B. KEECH,
Associate Justice."

The oral opinion shows that the court below did not predicate its dismissal of the indictment in this case solely on the construction of a statute. It follows, accordingly, that the Supreme Court has no jurisdiction over the instant appeal.

Under the Criminal Appeals statute, the Supreme Court has jurisdiction over a direct appeal from an order dismissing an indictment only in the event that the decision is predicated solely on the construction of a statute. *U. S.* v. *Borden*, 308 U. S. 188, 193. If the decision is, even "in part at least," based "on the inadequacy of the allegations of the indictment" to charge an offense, the ruling is predicated on a "matter of pleading" and the "correctness • • • (of the ruling) cannot under the statute be reviewed • • • on direct appeal from the district court." *U. S.* v. *Swift*, 318 U. S. 442, 444.

The only basis given by the court below for its dismissal of the indictment was contained in its oral opinion. The order entered by the District Court merely stated that the motion to dismiss had been granted. Looking at the oral opinion, it appears that the court placed its dismissal of the indictment on the ground, twice stated, that the indictment failed to set forth sufficient facts. Thus, the court said: "there has been a *failure* to set forth sufficient facts," and, again, "the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented." Counsel for the United States, in stating his exception, construed the ruling to be "that there are not adequate facts pleaded to make an offense."

Therefore, it seems plain that the ruling of the District Court that the indictment in the instant case fails to set forth sufficient facts to make out a conspiracy is, within the doctrine of the *Swift* case, *supra*, a ruling based "in part at least" on the inadequacy of the indictment as a pleading. From this it follows, we think, that the Supreme Court does not have jurisdiction over the instant appeal.

The reporter's transcript of the arguments supporting the motions to dismiss in this case has not been available to

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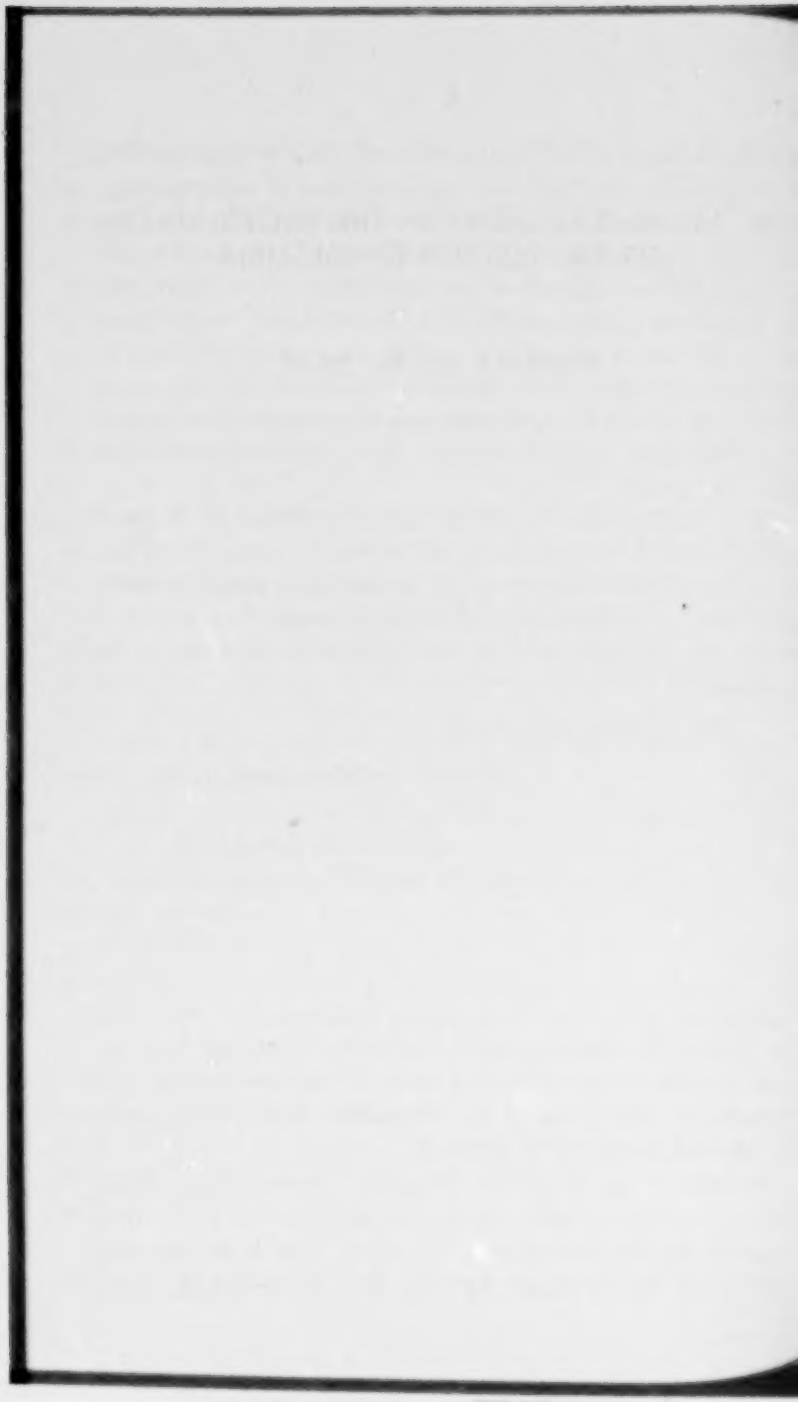
the defendants, with the exception of the one page setting forth the opinion of the lower court quoted in the beginning of this Statement, and will not be available until some time after the date upon which this defendant is required to file a statement in opposition to jurisdiction. The defendant is, therefore, unable at this time to point out the portions of the argument of counsel in the lower court relating to grounds other than the construction of the Sherman Act and other statutes, although such other grounds were urged upon the lower court in support of the motions to dismiss the indictment.

It is respectfully requested that this defendant be permitted to file a supplementary statement in opposition when the transcript of the argument in the lower court is made available to it, if this Court be of the view that the transcript of the argument is essential to a decision as to jurisdiction.

Respectfully submitted,

ROGER J. WHITEFORD,
JOHN J. WILSON,
Attorneys for Defendant.
Chestnut Farms-Chevy Chase Dairy.



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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

Supplemental Statement Opposing Jurisdiction and Motion to Transfer Case to the United States Court of Appeals for the District of Columbia.

Comes Now the defendant Chestnut Farms-Chevy Chase Dairy, Inc., by its attorneys, and adopts as a supplement to its "Statement in Opposition to Jurisdiction on behalf of defendant, Chestnut Farms-Chevy Chase Dairy" filed May 29, 1948 in this action, the "Statement Opposing Jurisdiction and Motion to Transfer Case to the Circuit Court of Appeals for the District of Columbia" filed in this action by the defendant B. B. Derrick.

Moreover, the defendant Chestnut Farms-Chevy Chase Dairy, Inc., by its attorneys, upon the grounds set forth in the two statements referred to above, and under the provisions of the Criminal Appeals Act, as amended, moves

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that the present appeal be transferred for hearing and determination to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

ROGER J. WHITEFORD,
JOHN J. WILSON,
Address: 815—15th St., N. W.,
Washington 5, D. C.,
Attorneys for Defendant,
Chestnut Farms-Chevy Chase Dairy, Inc.

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Office - Supreme Court
FILED
JUN 17 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF B. B. DERRICK OPPOSING JURISDICTION AND MOTION TO TRANSFER CASE TO UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
BEN IVAN MELNICOFF,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

Criminal Action No. 294-48

UNITED STATES OF AMERICA,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT OPPOSING JURISDICTION AND MOTION TO TRANSFER CASE TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Defendant B. B. Derrick files the present statement opposing jurisdiction on the ground that the judgment dismissing the indictment herein was based upon the deficiency of the indictment as a pleading as distinguished from a construction of the statute upon which the indictment is based.

Under the provisions of the Criminal Appeals Act, as amended by the Act of May 9, 1942, 56 Stat. 271, Chapter 295, 18 U. S. C. A. Section 682, Pocket Part, defendant Derrick moves, upon the same ground, that the present appeal be transferred for hearing and determination to the United States Circuit Court of Appeals for the District of Columbia.

Opinion of the District Court

The court below, immediately on the close of argument, rendered an oral opinion reading as follows:

> "The Court: The Motion to Dismiss is in two parts; one, that it is duplicitous and the other that the indictment is bad in substance.
>
> "The court holds that the indictment is not duplicitous.
>
> "As to the second ground, namely, that this indictment does not charge a crime, the court grants the Motion to Dismiss, believing that there has been a failure to set forth sufficient facts.
>
> "In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the Borden case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section III of the Sherman Act, in the view that I take of that act and other acts referred to in argument and judicial precedents presented.
>
> "Mr. Winn: Exception that there are not adequate facts pleaded to make an offense." (R. —)

Argument

Defendants Raised the Question of the Sufficiency of the Indictment as a Pleading:

Defendant Simpson Brothers, Inc. filed a Motion to Dismiss on the ground that the Indictment "does not state facts sufficient to constitute an offense against the United States." (R. —)

Defendant B. B. Derrick moved to dismiss on the ground that the Indictment was bad in substance in that it charged acts by an agricultural cooperative which are immune from

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prosecution under the Clayton Act, the Capper-Volstead Act, the Agricultural Adjustment Act and the decisions of the courts. But, a second ground was set forth as follows:

> "2. And, for such other reasons as are apparent on the face of the indictment herein." (R. —)

This is a familiar method of assailing the sufficiency of the indictment as a pleading and is commonly used for this purpose in the local District Court.

The Transcript of the Oral Argument on the Motion to Dismiss Shows the Indictment Was Assailed as a Pleading:

An inspection of the transcript of the oral argument on the Motion to Dismiss shows that fully as much time was devoted to showing the indictment was bad as a pleading as to the statutory point.

Mr. Leahy, attorney for defendant Derrick, at the outset of his argument on the Motion to Dismiss stated:

> "The motion is broad in its attack. It assails the sufficiency of the indictment to the point where it can no longer remain as a good pleading." (Tr. p. 97)

Pursuant to this, counsel attacked the allegations of paragraph 36, the charging part of the indictment.

As to paragraph 36(a) charging that written contracts were entered into between the distributors and the cooperative, counsel stated these allegations were deficient in the absence of the contracts themselves which should have been made part of the indictment. Counsel said:

> "We have here a request, therefore, that this assertion be deemed sufficiently definite so that the defendants may know with what they are charged, and at the same time that the Court may know and pass upon the claim that it substantially charges an offense to have

been committed by entering into those contracts." (Tr. p. 169)

Counsel later stated:

> ". . . and yet with no information given in this indictment Your Honor is called upon to accept against attack a statement to the effect that that is definite and certain enough to constitute a charge of crime.
>
> "Now, let it not be said it is curable by a bill of particulars. This is a case in which we assail this indictment because of its total overall indefiniteness to charge a crime" (Tr., p. 176-177).

As to the allegations of paragraph 36(b) of the indictment, counsel stated that there was:

> ". . . nothing in all the allegations of the indictment whatsoever to correlate it into an unreasonable restraint of trade. It is alleged that these contracts exist, with no description whatever of methods and means employed to supply the demand; with no illustration or explanation setting forth what the requirements of milk production may be; with no allegation that the milk produced for this area, which I told you this morning has the reputation for being the purest milk sold in the United States; with no allegation that it would enhance the price, . . ." (Tr., p. 179-180).[1]

As to paragraph 36(d), counsel contended that it was an "incomprehensible allegation." (Tr. p. 188) He said:

> "I don't know what it means, prices as low as the prices charged by the association to defendant distributors. I think I will have to pass it up and put the explanation on the other side" (Tr., p. 188).

---

[1] The stenographic transcript, although designated almost immediately by defendant Derrick as part of the record herein, was not written up until almost a month after the hearing. It is therefore, garbled and almost unintelligible in spots.

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As to the classification of milk contained in paragraph 36(g), counsel contended that "there is nothing left but conclusions of the pleader" (Tr., p. 199).

As to paragraph 36(j), counsel stated:

> "A mere conclusion, a mere conclusion of the pleader as to what should be the effect of the termination of an order, when the pleader knows as a matter of fact that when that order terminated we were right under the jurisdiction of the State of Virginia as to our price" (Tr., p. 200).

Counsel later stated as to the same paragraph:

> "Now, can there be an allegation whatsoever of wrongdoing laid to our doing a perfectly legitimate act? Never mind the motive. . . . If we do what we have the right to do lawfully we may gain in our own personal interest. That is as sound as a bell, and they can't paint a conspiracy out of it, and there is no way to do it and, furthermore, they do not charge the price did fall.
>
> "They do not say the effect of it would result in a reduction in price. Who knows whether it would, or not?
>
> "Let's not deal in argument. A pleading has no right by way of implication or argumentation as a means to supply direct proof.
>
> • • • • • • •
>
> "So why doesn't this pleader take the law which is open to him and say that thereby they unduly enhanced the price? There is a right way to plead, and there is a way to sneak around a fact that can't be met.
>
> "The Court: Wouldn't that be equally a conclusion, that they were unduly enhanced?
>
> "Mr. Leahy: It would be a conclusion unless the facts were there to establish a basis for it. This is all a conclusion here" (Tr., pp. 201-203).

As to paragraph 36(k) charging that defendants conspired to persuade the Virginia State Milk Marketing Commission to promulgate certain orders, defendant's counsel contended that this simply alleged a "perfectly lawful act which we have a right to do because we still have our right to free speech" (Tr., p. 204). He also stated:

> ". . . there is no charge that they did it unlawfully. There is no charge it was done through misrepresentation. There is no charge that it was done through improper methods. There is no charge that that is all the information that was presented, or that it was erroneous information, and certainly there is a presumption at least that this officially delegated body of the State of Virginia performed its functions intelligently, honestly, and lawfully; and against such a paragraph as that, to say that that act done by us lawfully and legally, and then as they have stated publicly: 'That we do not accuse the Commission of being a co-conspirator,' then there is no allegation of a crime committed, because if the Commissioners were not co-conspirators then there is no imposition upon the Commission, and the presumption then is that the Commission acted in the appropriate, proper and lawful manner, and that what it did was legal" (Tr., pp. 205-206).

As to the allegations in paragraph 36(l) as to persuading the Health Department of the District of Columbia, under the guise of Health Regulations to prevent the importation of milk into the District of Columbia from producers who had not been inspected and licensed, counsel stated:

> "Now, isn't that too bad? Isn't that too bad that we persuaded the District health officials not to introduce into the District of Columbia milk which has not been inspected and licensed by us?" (Tr., p. 207).

He commented once more on the lack of any charge of misrepresentation or refusal to supply information and the

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absence of any direct averment and of a charge by "implication" (Tr., p. 208). Counsel stated:

> "They are not decent enough in the pleading even to assign the reasons for it, and we are entitled to the reasons why we didn't import milk into the District outside of those states, . . ." (Tr., p. 208).

He commented on the absence of any charge of "coercion, boycotting, blacklisting" (Tr., p. 209), and that the absence of these allegations had:

> ". . . stripped this indictment of all its life and vigor because it is by those lawful means lawfully employed for a lawful end that these men did the things for which complaint is made now" (Tr., p. 209).

As to paragraph 36(m) charging defendants discussed and agreed upon prices at which distributors should sell fluid milk, counsel stated:

> "Now, they do not charge us with fixing prices. They do not charge us with fixing unduly enhanced prices. They merely, by way of intendment, by argument and implication, seek to do what they cannot charge even indirectly" (Tr., p. 210).

He likewise commented on the indefiniteness of the indictment (Tr., p. 210) and that the pleader had left the matter of a conspiracy to fix an unduly enhanced price "to intendment, implication and argument" (Tr., p. 211).

As to the allegations of paragraph 36(n) that defendants conspired to remove "existing milk from the market," counsel stated that the allegation means absolutely nothing (Tr., p. 212).

As to the allegations of paragraph 36(o) that the defendants agreed that the existing milk would be removed from

the market even though the distributors would suffer a financial loss in so doing, counsel said:

> "What are we charged with? Are we charged with attempting a monopoly and then taking the excess supply off the market and preventing the other distributors coming in?" (Tr., p. 213).

As to the general allegations in paragraph 36(p) of an agreement to do a variety of acts, counsel said:

> "This is the wastebasket of the indictment, if the Court please. This includes everything in one overall general allegation, pleading deficiencies which have heretofore existed, without specifying details and facts, which it must do, but which it doesn't do, to hold up against the motion to dismiss: . . . (Tr., p. 213).

Counsel also stated, "We want to know the facts with which we are charged . . . give us facts, let us know what the concerns are, let us know whom we have shut off" (Tr., p. 215).

As to the allegation of paragraph 36(p) relative to an agreement to take away contract business from price-cutting, non-contracting distributors, counsel said:

> "What does it mean? They give us no information which we can depend on at all, simply a broad, generally indefinite sort of indictment" (Tr., p. 217).

He also referred to it as:

> "Just a hodge-podge of words pulled out of some indictment."
> "Will Your Honor explain to me what the meaning of 'interfering' is?" (Tr., p. 217)

As to the allegation of paragraph 36(p) relating to forcing price-cutting, non-contracting distributors out of business into bankruptcy, counsel claimed their allegations were unintelligible.

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Summing up, counsel stated that he had attacked the indictment for its substantial deficiencies to charge a crime (Tr., p. 218). As to the acts charged, counsel stated:

> ". . . no facts are alleged here in order to acquaint us with the type or character of the illegality against which we must defend ourselves, and if you take the full supply contract, if you take the classified use market plan, if you take this persuasion of the Virginia and the District health associations out of this it becomes just a jargon of words and a hodge-podge of language with no facts definitely alleged" (Tr., p. 219).

Counsel further stated:

> ". . . I say those men are entitled to a decent indictment, and I say this indictment ought not to be sustained on some slender thread of intendment, implication or argument. . . .
>
> "Then at least we have a right to know, and I say this with all seriousness and all earnestness, we have a right to know by direct allegation of fact what it is we are called upon to defend" (Tr., p. 220).

It is evident from the above quotations that counsel for defendant Derrick, in addition to claiming defendant's acts were immunized by Section 6 of the Clayton Act and the Capper-Volstead Act properly construed, also argued extensively the invalidity of the indictment as a pleading for failure to state sufficient facts. The challenge to the indictment as a pleading was referred to by the Court. After Mr. Skiles, the Government counsel replied, the Court said:

* * * * * * * *

> "THE COURT: . . . May I ask Mr. Skiles if he desires to deal with the indictment itself? Do you desire to deal with whether or not the indictment does properly——
>
> "MR. SKILES (interposing): No, sir, I do not care to go beyond the allegations of the indictment" (Tr., p. 241).

In the reply argument defense counsel once more commented upon the failure of the indictment to set forth the contract with the distributors. He said:

> ". . . that brings up once again the absolute indefiniteness of this indictment because Your Honor does not know what the contract is in this case. That is not a question of proof. That is not in our bill of particulars. That lack of definite statement is only of substantive sufficiency in pleading. Your Honor hasn't this contract before you to determine whether it contains a monopoly or does not contain a monopoly" (Tr., p. 243).

Once more counsel complained that the indictment was "filled with conclusions and argument" (Tr., p. 270) and was "indefinite" and made up of conclusions "without any allegation whatsoever there was any threat, intimidation, or coercion, overcharge or misrepresentation on the part of anyone" (Tr., p. 282).

The Court's Opinion:

The foregoing argument of counsel indicates what was in the mind of the court when it rendered its opinion. The court said that, "as to the second ground, namely that this indictment does not charge a crime, the court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts." This immediately followed the argument of counsel for Defendant Derrick relative to the absence from the indictment of the contracts with the distributors and other failures on the part of the indictment to set forth facts as distinguished from mere conclusions. As an example, there are no facts set forth with reference to the charges contained in paragraph 36(i), (j) and (k) as to a conspiracy between defendants to control the official action of the District of Columbia Health De-

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partment, the Department of Agriculture, and the Virginia Milk Marketing Commission.

The court in its opinion disavowed any intention of holding that the Sherman Act would not, under any circumstances, be applicable to a case involving a cooperative. The court also recognized this Court's holding in *U. S.* v. *Borden*, 308 U. S. 188, and then went on to say:

> "I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented" (Tr., p. 334).

The Applicable Authorities:

The decision below is, at the least, ambiguous and under these circumstances no appeal lies to this Court.

In *U. S.* v. *Wayne Pump Co.*, 317 U. S. 200-204, this Court dismissed the appeal, stating, "The language of the opinion makes it apparent to us that the District Court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments." Also, in *U. S.* v. *Carter*, 231 U. S. 492, this Court refused to attempt to sove the problem as to the ground on which the court ruled by an examination of the entire record. It held that the Criminal Appeals Act precluded review in the absence of a clear showing that the statute applied. In *U. S.* v. *Moist*, 231 U. S. 701, this Court likewise refused to pass on an appeal where it did not appear on what ground the court acted.

As stated in *Robertson & Kirkham's Jurisdiction of the Supreme Court*, Section 169: "Where the grounds of the District Court's decision are ambiguous, doubt will be resolved against applied jurisdiction."

Enough has been said herein to indicate the dubiousness of any contention that the Court dismissed the indictment solely on the statutory point.

The Government Possesses an Easy Remedy:

There is no explanation in the government's Jurisdictional Statement as to why under these circumstances it does not follow the recommendation contained in the concurring opinion of Mr. Justice Jackson in *U. S.* v. *Swift*, 318 U. S. 442, 446, and obtain a certificate from the trial Judge stating clearly on what ground he based his present decision. After stating that the Supreme Court would be greatly aided if the District Court in dismissing an indictment would state a ground upon which the decision was based, Justice Jackson stated: "I am confident that a request from the Government to do so would generally be granted and that to do so would be of assistance to the Government in taking, and to us in passing, on appeals" (at p. 446).

In *Robertson & Kirkham's Jurisdiction of Supreme Court*, Section 169, above referred to, the rule is stated as follows:

> "In order to guard against difficulties of this character, it has become established practice to procure the District Judge to execute a certificate declaring that his judgment was put entirely upon the construction or the invalidity of the statute upon which the indictment was founded and to include such certificate in the transcript of record on appeal."

Citing:

U. S. v. *Chavez*, 290 U. S. 357-59;
U. S. v. *Flores*, 289 U. S. 137-145;
U. S. v. *Hastings*, 296 U. S. 190-191;
U. S. v. *Halsey Stewart Co.*, 296 U. S. 451.

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Motion to Transfer to United States Court of Appeals:

Prior to the amendment of the Criminal Appeals Act by the Act of May 9, 1942, 56 Stat. 271, Chapter 295, 18 U.S.C.A. 682, this Court could only dismiss where the judgment below was based either in whole or in part upon the deficiency of the indictment as a pleading. Now, however, under the provisions of the above-quoted statute, this Court has power to remand the court to the United States Court of Appeals as suggested in *U. S.* v. *Wayne Pump Co.*, 317 U. S. 200, 208-210. This would appear to be the proper disposition of the present appeal.

As the Circuit Court of Appeals has power to decide both the question of the validity of the indictment as a pleading and the statutory question, the government will not in any way lose any of its statutory right of review.

Also, this Court has frequently expressed its reluctance to pass upon important questions of constitutional law or the meaning of statutes, upon a demurrer to an indictment or on a Motion to Dismiss before the full facts have been adduced at the trial. Assuming that the decision below does involve, as contended upon the last page of the government's Jurisdictional Statement, a substantial question as to the extent to which a cooperative may lawfully go in eliminating competition, the case at the present time is in an obviously unsatisfactory state for any final decision by this Court with respect to the legal boundaries within which a farm cooperative may move.

Conclusion

As it appears that the judgment below was at least in part based upon the invalidity of the indictment as a pleading, the present appeal should be remanded in accordance with the provisions of the Act of May 9, 1942, 18 U.S.C.A. 682 (Pocket Part) to the Circuit Court of Appeals for the Dis-

trict of Columbia. Or if the government insists that the judgment below was based solely upon a construction of a federal statute, it should pursue the obvious course of obtaining a certificate to that effect from the trial judge, in accordance with approved practice. Neither this Court nor counsel should be burdened with the difficulty and uncertainty of a procedural question, jurisdictional in character, which can so easily be eliminated from the case.

Respectfully submitted,

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
BEN IVAN MELNICOFF,
1000 Bowen Building,
Washington 5, D. C.,
Attorneys for Defendant, B. B. Derrick.

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SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUN 17 1948
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF SAFEWAY STORES, INCORPORATED, OPPOSING JURISDICTION

ELISHA HANSON,
ARTHUR B. HANSON,
LETITIA ARMISTEAD,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

CRIMINAL ACTION

No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT OF APPELLEE, SAFEWAY STORES, INCORPORATED, OPPOSING JURISDICTION

Comes now Safeway Stores, Incorporated, a defendant in the above-entitled case, by its attorneys, and pursuant to Rule 12, paragraph 3, Rules of the Supreme Court of the United States, discloses the following matter making against the jurisdiction of said Court, as asserted in a statement of the basis of appellate jurisdiction filed by appellant on May 11, 1948.

The United States is appealing under the Criminal Appeals Act (18 U. S. C. A. 682) from an order of the District Court of the United States for the District of Columbia dismissing an indictment returned on March 8, 1948, founded on Section 3 of the Sherman Anti-Trust Act (15 U. S. C. A. 3).

Statement of the Case

Appellee, Safeway Stores, Incorporated, disagrees with the statement by the United States of the issues and the ruling below and herewith offers its own brief statement of the case.

A one count indictment numbering twelve pages was returned on March 8, 1948. Safeway Stores, Incorporated, was one of the nine defendants named therein.

Two of the defendants named in the indictment filed motions to dismiss.

Simpson Brothers, Inc., filed a motion to dismiss on two grounds, namely that the indictment was duplicitous, and, second, that the indictment did not state facts sufficient to constitute an offense against the United States.

Defendant B. B. Derrick filed a motion to dismiss the indictment on the ground that it was bad in substance in that it charged acts by an agricultural cooperative which were immune from prosecution under the anti-trust laws by reason of subsequent legislation and for such other reasons as were apparent on the face of the indictment.

The trial judge held that the indictment was not duplicitous but granted the motions to dismiss on the ground that sufficient facts had not been pleaded to constitute an offense against the United States.

The trial judge on his own motion then dismissed the indictment as to all remaining defendants. The opinion of the lower court was rendered on April 27, 1948, and is yet not officially reported. It is therefore set out in its entirety as it appears at pages 333 and 334 of the Official Transcript of Proceedings designated as a part of the record herein:

> "Opinion of the Court.
>
> "The Court: The motion to dismiss is in two parts; one, that it is duplicitous and the other that the indictment is bad in substance.

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"The Court holds that the indictment is not duplicitous.

"As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

"In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the Borden case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

"Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

"Mr. Seal: That goes to all the defendants?

"The Court: Yes, sir.

"(Thereupon, the instant hearing was concluded.)"

The order of the trial court entered on the motions to dismiss reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Criminal No. 294-48

Filed April 27, 1948. Harry M. Hull, Clerk

UNITED STATES

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al., Defendants

Order Dismissing Indictment

"Upon consideration of the motions of the defendants, Simpson Brothers, Inc., and B. B. Derrick, respectively, to dismiss the indictment in the above entitled cause,

"It is this 27th day of April, A. D. 1948,

"Ordered, That the motion of Simpson Brothers, Inc. to dismiss the indictment be and the same is hereby granted, and,

"It Is Further Ordered, That the motion of the defendant B. B. Derrick to dismiss the indictment be and the same is hereby granted and

"It Is Further Ordered, That upon consideration of the Court's motion, the indictment in the above-entitled cause be and the same is hereby dismissed as to all remaining defendants.

By the Court.

(S.) R. B. KEECH,
Associate Justice."

Full opportunity was afforded all parties to present their views in the court below. After three full days of argument, the trial judge rendered his opinion and entered his

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order. The official transcript has been designated as a part of the appeal record and is incorporated herein by reference.[1]

The trial judge had before him the indictment which also has been designated as part of this record on appeal. He based his opinion on the indictment itself and not on the summary of the indictment which the United States has submitted as part of its appeal. The sufficiency of the indictment itself was the principal issue raised by the motions to dismiss and is the principal issue here.

Reasons to Dismiss

The record is clear that the opinion of the trial judge dismissing the indictment was based solely on the ground that the indictment was faulty as charged in the motions to dismiss. It was not predicated on the construction of a statute or statutes. Therefore, in accordance with the Criminal Appeals Act and the decisions of the courts, the Supreme Court of the United States has no jurisdiction over the instant appeal. 18 U. S. C. A. 682; *United States* v. *Borden Co.*, 308 U. S. 188; *United States* v. *Wayne Pump Co.*, 317 U. S. 200; *United States* v. *Swift & Co.*, 318 U. S. 442.

The statement by the United States that the *Borden* case is on all fours with the instant case is misleading as presented. The Supreme Court in its opinion in the *Borden* case said:

> "The established principles governing our review are these: (1) Appeal does not lie from a judgment

[1] Although urgently requested from the date of the trial judge's ruling on the motions to dismiss, the official transcript was not delivered to counsel for appellee herein until June 1, 1948. The errors in said transcript are numerous, beginning with the failure to note the appearances of Elisha Hanson and Letitia Armistead on behalf of appellee herein. Time was not available to correct the record and to file opposition to the notice of appeal within the time allowed by the Rules. The record is clear, however, in support of the views outlined in the opposition to appeal.

which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review."[2] (308 U. S. at page 193.)

There is no reasonable manner in which the clear cut opinion of the trial judge can be considered in any other light than that of section (1) of the above quotation. Even if it be so, it cannot be viewed in a light beyond that of section (2) of the above quotation. Unless the principles long established are now rejected, this Court must hold that it has no jurisdiction over the present appeal.

It should also be pointed out that in the *Borden* case the trial judge wrote a lengthy opinion in respect of the statutes. He felt this necessary in that case because of the complexity of the factual situation presented. A study of the indictment in the *Borden* case will show that the United States went to great lengths to implicate city officials and unions as well as a producers cooperative and distributing dairies. There were numerous averments of coercion, duress, physical violence and other elements lending an air of criminality to the entire situation. There were no such averments in the indictment in the instant case. The arguments below were clear in that the parties alleged to have conspired here were merely conducting normal contractual relationships which tended to react to the benefit of the cooperative.

---

[2] Principles numbered (4) and (5) in the same paragraph of the opinion are not quoted, as they are inapplicable to the instant case.

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In the *Borden* case the Court had to interpret statutes to take the cooperative and the labor unions out from under the Sherman Act. In the instant case no such interpretation was necessary, for the indictment itself did not plead facts sufficient to constitute an offense against the United States under the Sherman Act. That and no more was the holding of the trial judge.

There is no doubt but what the United States would have properly filed its appeal to this Court if the question involved was a dismissal based solely upon the invalidity or construction of a statute or statutes. This Court has clearly so held in *United States* v. *Hastings*, 296 U. S. 188, and likewise in the *Borden* case.

Just as clearly, however, this Court has held that it does not have jurisdiction in a case such as the one before it now. In *United States* v. *Wayne Pump Company*, 317 U. S. 200, this Court stated at pages 207-208:

> "In the light of the opinion, however, we conclude that the judgment upholding the demurrer was based also on grounds independent of the construction of the statute involved. The demurrers upon which the ruling below was based show on their face, as appears from the typical example below, that they were aimed not at the coverage of the Sherman Act but at the form of the indictment. This was the objection determined by the court. The excerpts from the opinion quoted above are conclusive, we think, that the District Court rested its ruling on the insufficiency of the pleading as an independent ground.
>
> "*Since the judgment below was not placed solely upon the invalidity or construction of the statute but had an additional and independent ground, the Criminal Appeals Act does not authorize review.*" (Emphasis supplied)

This statement was based on the finding of the trial court judge, which is found at pages 205-206 of the same case and stated in part as follows:

> "The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished."

Likewise, in *United States* v. *Swift & Company*, 318 U. S. 442, this Court adhered to its views expressed in the cases above cited.

In view of the foregoing, it is clear that this Court must reject the appeal of the United States in the instant case because it has no jurisdiction to entertain said appeal under the Criminal Appeals Act. The law is now so well settled on the facts presented that there obviously can be no substantial question for the Court to consider. No statutory interpretation such as the United States has tried to read into the trial judge's opinion was before the Court below. In the absence of some such interpretation there clearly can be no reason to confuse the issues here by attempting to inject into the case the results of confused thinking regarding the effect of the Capper-Volstead Act, the Agricultural Adjustment Act, and the Clayton Act as they might or might not apply to the Sherman Act when no such question arose in the court below.

Conclusion

Therefore, it is submitted that this honorable Court has no jurisdiction under the Criminal Appeals Act to entertain this appeal and that there is no substantial question in-

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volving the interpretation of Federal statutes, and the appeal should be dismissed.

Respectfully submitted,

ELISHA HANSON,
ARTHUR B. HANSON,
LETITIA ARMISTEAD,
Attorneys for the Appellee, Safeway Stores, Incorporated.

June 4, 1948.

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JUN 11 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 61 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF SIMPSON BROS., INC., OPPOSING JURISDICTION

JOHN F. HILLYARD,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1947

Criminal Action No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT OPPOSING JURISDICTION

Comes now the defendant, Simpson Bros., Inc., by its attorney, and in opposition to the assertion of Petitioner, that the Supreme Court has jurisdiction of the appeal filed herein, states that the judgment dismissing the indictment herein was based by the Lower Court upon the deficiency of the indictment as a pleading as distinguished from a construction of the statute upon which the indictment is based.

Argument

This respondent concedes that if the judgment below was based solely on a construction of the statute upon which the indictment is based, then the petitioner is correct in making direct appeal to the Supreme Court.

In order to conclusively show, however, that petitioner has directed its appeal improvidently, this respondent feels

it necessary to cite but one case, *i. e., United States* v. *Borden,* 308 U. S. 188. In that case the indictment consisted of four counts. Mr. Chief Justice Hughes delivered the opinion of the Court, and the following is quoted from the opinion:

> "The established principles governing our review are these:
>
> (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. • • •
>
> First: The first two of these principles, *(supra)* as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. (Cases cited). The appeal as to count three must be dismissed."

In this case, the Court below ruled as follows on the indictment which consisted of only *one* count:

> "THE COURT: The Motion to Dismiss is in two parts; one, that it is duplicitous and the other that the indictment is bad in substance.
>
> "The court holds that the indictment is not duplicitous.
>
> "As to the second ground, namely, that this indictment does not charge a crime, the court grants the Motion to Dismiss, *believing that there has been a failure to set forth sufficient facts* (Italics supplied).
>
> "In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must— to the determination in the Borden case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to con-

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stitute a conspiracy in violation of Section III of the Sherman Act, in the view that I take of that act and other acts referred to in argument and judicial precedents presented."

It is quite clear, therefore, that the lower Court ruled that the indictment was defective as a pleading.

Therefore, under the holding in the *Borden* case, the lower Court's judgment is not appealable directly to the Supreme Court of the United States.

The Petitioner should have directed its appeal through the proper channel which is the United States Court of Appeals for the District of Columbia.

This defendant prays that the appeal of Petitioner be denied.

Respectfully submitted,

JOHN F. HILLYARD,
Address: 815 15th St., N. W.,
Washington 5, D. C.,
Attorney for Defendant Simpson Bros., Inc.

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FILED
JUN 17 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THOMPSON'S DAIRY, INC., OPPOSING JURISDICTION

RAYMOND SPARKS,
W. V. T. JUSTIS,
Counsel for Appellee.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

Criminal Action

No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT IN OPPOSITION TO JURISDICTION ON BEHALF OF DEFENDANT, THOMPSON'S DAIRY INC.

Comes now Thompson's Dairy, Inc., by its attorneys, and, pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, submits the following statement disclosing matter or ground making against the jurisdiction of the Supreme Court in the instant case.

The United States attempts to appeal, under the Criminal Appeals Act (18 U. S. C. A. Sec. 682) from an order of the District Court of the United States for the District of Columbia dismissing an indictment founded on Section 3 of the Sherman Anti-Trust Act.

Motions to dismiss the indictment were granted by the court below on the ground that the indictment does not set forth facts sufficient to charge a crime. The oral opinion of the court below concerning the action taken by it on the motions to dismiss reads as follows:

"Opinion of Court

Keech, J.: The motion to dismiss is in two parts; one, that it is duplicitous, and the other that the indictment is bad in substance.

The Court holds that the indictment is not duplicitous.

As to the second ground, namely, that this indictment does not charge a crime, the Court grants the motion to dismiss, believing that there has been a failure to set forth sufficient facts.

In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must—to the determination in the *Borden* case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Sec. 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented.

Mr. Winn: Exception. That there are not adequate facts pleaded to make an offense.

Mr. Seal: That goes to all the defendants?

The Court: Yes, sir."

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The order entered by the court below on the motions to dismiss reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Criminal No. 294-48

UNITED STATES

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL., Defendants

Filed April 27, 1948. Harry M. Hull, Clerk

Order Dismissing Indictment

Upon consideration of the motions of the defendants, Simpson Brothers, Inc., and B. B. Derrick, respectively, to dismiss the indictment in the above entitled cause,

It is this 27th day of April, A. D. 1948,

ORDERED, That the motion of Simpson Brothers, Inc., to dismiss the indictment be and the same is hereby granted, and,

IT IS FURTHER ORDERED, That the motion of the defendant B. B. Derrick to dismiss the indictment be and the same is hereby granted, and

IT IS FURTHER ORDERED, That upon consideration of the Court's motion, the indictment in the above-entitled cause be and the same is hereby dismissed as to all remaining defendants.

By the Court.

(S.) R. B. KEECH,
Associate Justice."

The oral opinion shows that the court below did not predicate its dismissal of the indictment in this case solely on the construction of a statute. It follows, accordingly, that the Supreme Court has no jurisdiction over the instant appeal. Under the Criminal Appeals statute, the Supreme Court

has jurisdiction over a direct appeal from an order dismissing an indictment only in the event that the decision is predicated solely on the construction of a statute. *U. S.* v. *Borden*, 308 U. S. 188, 193. If the decision is, even "in part at least", based "on the inadequacy of the allegations of the indictment" to charge an offense, the ruling is predicated on a "matter of pleading" and the "correctness • • • [of the ruling] cannot under the statute be reviewed • • • on direct appeal from the district court." *U. S.* v. *Swift*, 318 U. S. 442, 444.

The only basis given by the court below for its dismissal of the indictment was contained in its oral opinion. The order entered by the District Court merely stated that the motion to dismiss had been granted. Looking at the oral opinion, it appears that the court placed its dismissal of the indictment on the ground, twice stated, that the indictment failed to set forth sufficient facts. Thus, the court said: "there has been a failure to set forth sufficient facts", and, again, "the indictment in this case does not set forth sufficient facts to constitute a conspiracy in violation of Section 3 of the Sherman Act, in the view that I take of that Act and other Acts referred to in argument and judicial precedents presented." Counsel for the United States, in stating his exception, construed the ruling to be "that there are not adequate facts pleaded to make an offense."

Therefore, it seems plain that the ruling of the District Court that the indictment in the instant case fails to set forth sufficient facts to make out a conspiracy is, within the doctrine of the *Swift* case, *supra*, a ruling based "in part at least" on the inadequacy of the indictment as a pleading. From this it follows, we think, that the Supreme Court does not have jurisdiction over the instant appeal.

The reporter's transcript of the arguments supporting the motions to dismiss in this case has not been available to

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the defendants, with the exception of the one page setting forth the opinion of the lower court quoted in the beginning of this Statement, and will not be available until sometime after the date upon which this defendant is required to file a statement in opposition to jurisdiction. This defendant is, therefore, unable at this time to point out the portions of the argument of counsel in the lower court relating to grounds other than the construction of the Sherman Act and other statutes, although such other grounds were urged upon the lower court in support of the motions to dismiss the indictment.

It is respectfully requested that this defendant be permitted to file a supplementary statement in opposition when the transcript of the argument in the lower court is made available to it, if this Court be of the view that the transcript of the argument is essential to a decision as to jurisdiction.

Respectfully submitted,

RAYMOND SPARKS,
W. V. T. JUSTIS,
Attorneys for Defendant,
Thompson's Dairy, Inc.

No. 89. UNITED STATES *v.* MARYLAND & VIRGINIA MILK PRODUCERS ASSOCIATION, INC. ET AL. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The motions to transfer are granted and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit pursuant to Title 18, United States Code, § 3731. *United States* v. *Swift & Co.*, 318 U. S. 442; *United States* v. *Wayne Pump Co.*, 317 U. S. 200. *George T. Washington*, then Acting Solicitor General, for the United States. *Elwood H. Seal* for the Maryland & Virginia Milk Producers Assn., Inc.; *William Blum, Jr.* for Alexandria Dairy Products Co., Inc.; *John J. Wilson* for the Chestnut Farms-Chevy Chase Dairy; *William E. Leahy* and *William J. Hughes, Jr.* for Derrick; *Elisha Hanson, Arthur B. Hanson* and *Letitia Armistead* for Safeway Stores, Inc.; *John F. Hillyard* for Simpson Bros., Inc.; and *Raymond Sparks* for Thompson's Dairy, Inc., appellees.

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